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Twenty-ninth session

SUMMARY RECORD OF THE 591st MEETING

Held at Headquarters, New York,
on Monday. 3 June 1996, at 10 a.m.

Chairman: Mrs. PIAGGI de VANOSSI (Argentina)

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ELECTRONIC DATA INTERCHANGE: DRAFT MODEL LAW; POSSIBLE FUTURE WORK (continued)

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The meeting was called to order at 10.15 a.m.

ELECTRONIC DATA INTERCHANGE: DRAFT MODEL LAW; POSSIBLE FUTURE WORK (continued) A/50/17; A/CN.9/409/Add.1; A/CN.9/426)

Article 13 (continued)

1. Mr. FERRARI (Italy) said his delegation strongly opposed the use of the words "manifestation of will" in the wording proposed by Mexico for paragraph 1 of article 13.

2. The CHAIRMAN said that while the Commission appeared to have accepted the wording proposed by Mexico, the final version of the text and heading of the article would be formulated by the drafting group.

3. Mr. ABASCAL (Mexico) drew attention to the difference between article 13 and article 4, which stated that "information shall not be denied legal effectiveness, validity or enforceability solely on the grounds that it is in the form of a data message".

4. Mr. MASUD (Observer for Pakistan) said article 13 had been intended to deal with the entire process of contract formation. As currently formulated, however, the article covered only the making and acceptance of an offer, and not with the equally essential matter of the entry into effect of that offer or of its acceptance. Since article 14, paragraph 2 (a), stipulated that "receipt occurs at the time when the data message enters the designated information system", problems could arise if the addressee did not immediately become aware of the message's arrival in that system. The article should therefore be given further careful consideration.

5. Mr. ZHANG Yuqing (China) agreed that article 13 required further consideration, because the proposed changes in its wording would appear to imply or require expanding its scope beyond contract formation; his delegation was firmly opposed to such an expansion.

6. Mr. SORIEUL (International Trade Law Branch) said the Commission had already concluded its discussion of article 13, but perhaps a new article could be formulated to deal with the handling of manifestations of will or other statements conveyed by means of data messages.

7. Mr. BURMAN (United States of America) said such terms as "manifestations of will and other statements" could be clarified by explicitly relating them to more specific terms, such as "performance". The article's scope would thereby be extended beyond contract formation, but not to an excessive degree.

8. Mr. CHOUKRI (Observer for Morocco) said a manifestation of will was only binding upon the party manifesting or expressing that will. He therefore suggested a clarification of article 13, paragraph 1, that would allow offers and acceptances to be expressed by means of data messages in the context of manifestations of will.

9. Mr. LEBEDEV (Russian Federation) pointed out that articles 4 and 13 of the draft Model Law were similar in content and wording.

Article 11

10. Mr. SORIEUL (International Trade Law Branch) recalled that questions had been raised at the Commission's twenty-eighth session with regard to the applicability of article 11 to telegram, telecopy and telex messages, as well as the criteria for ascertaining the authenticity of a data message in the context of telegrams or telex. The Commission had decided to reconsider the inclusion of article 11, subparagraph 3 (a) (ii), in view of the possible legal consequences it entailed; moreover, no decision had been taken on article 11, paragraph 6. The Commission had also agreed to delete the previous draft paragraph 8.

11. Mr. SCHNEIDER (Germany) said article 11 constituted the core of the Model Law; any changes to it required careful consideration of its underlying principles, as well as of its consequences. Article 11, subparagraph 3 (a) (ii), as currently formulated, could endanger international commerce by placing too heavy a burden on the addressee of a potentially falsified message, and should therefore be deleted.

12. Mr. BURMAN (United States of America) said that, although his delegation had previously favoured retaining the original language of that subparagraph, it had consulted many experts in the commercial and data-exchange fields and had changed its position to that just expressed by the representative of Germany. Retaining that subparagraph would not work in the marketplace, and could jeopardize the use of the Model Law. His delegation therefore joined Germany in urging that it be deleted.

13. Mr. ABASCAL (Mexico) said his delegation, too, agreed with the proposal to delete subparagraph 3 (a) (ii), which had similarities with the Model Law on International Credit Transfers, in that a message could be attributed to the originator only on the basis of some previously agreed procedure for authentication. When article 11 had been drafted, it had seemed to apply to open electronic-data interchange; the provision regarding "reasonable circumstances" should allow for authentication without prior agreement, but if it would cause problems it would be preferable to delete it.

14. Mr. FERRARI (Italy) said his delegation also favoured deletion of subparagraph 3 (a) (ii), but consideration must then be given to the fact that ways of ascertaining whether a message was that of the originator would, consequently, be very limited.

15. Mr. ANDERSEN (Observer for Denmark) suggested that, in subparagraph 3 (a) (i), "or" could be replaced by "and", to make it clear that prior agreement as such was not the entire basis for relying on the data message.

16. Mr. MADRID (Spain) said his delegation shared the concerns expressed by previous speakers and supported the proposed deletion of subparagraph 3 (a) (ii) to ensure greater certainty in commercial transactions. Article 11,

paragraph 2, was ambiguous. Some delegations saw a necessity for prior agreement among the parties; Denmark had just pointed out the need to place a further restriction on attribution. His delegation nevertheless believed that article 11, paragraph 1, was sufficiently broad to allow anyone with an inter-computer communications system to conclude a contract with a third-party service provider and take as authentic messages received from that third party. Contracting parties could also agree on a third-party service provider, but it should be made clear whether that possibility would be covered in the article or should be discussed in greater depth in the Guide to Enactment of the Model Law. Some uncertainty also remained regarding the extent to which prior agreement was needed. Assurances and security should be provided, but restrictions should not be imposed.

17. Mr. GOH (Singapore) said he supported the deletion of subparagraph 3 (a) (ii), but did not agree with the suggestion of the observer for Denmark which, in his view, would lead to greater uncertainty.

18. Mr. TELARANTA (Finland) said he supported the suggestion of Denmark.

19. Ms. REMSU (Observer for Canada) said both the proposal of Germany and the suggestion of Denmark would confine the interchange to the relationship between the originator and the addressee. Her delegation preferred the proposal to delete paragraph 3 (a) (ii).

20. Mr. MASUD (Observer for Pakistan) said once an agreed procedure had been followed, further authentication was not necessary because of the autonomy of the parties. Therefore, his delegation opposed the suggestion of Denmark.

21. Mr. ABASCAL (Mexico) said there seemed to be general agreement that subparagraph 3 (a) (ii) should be deleted. The Danish suggestion would make the text of article 11 parallel to the text of the Model Law on International Credit Transfers, which required prior agreement on an authentication procedure. That Model Law identified authentication as a procedure established by agreement between the parties to determine whether a message actually was issued by the person indicated as the sender. It also expressly stated that no procedure could be agreed upon that was not "reasonable in the circumstances". The Danish suggestion varied somewhat, however. Article 11, as part of chapter III, would be subject to "variation by agreement" (article 10). In his opinion, the system in the Model Law on International Credit Transfers was more secure, since article 11 of the draft under consideration was quite restrictive for the originator. In the Model Law on International Credit Transfers, the agreement was arrived at between the originator and the addressee, but that was not the case in article 11.

22. Mr. SCHNEIDER (Germany) said it should be left to the parties to decide on procedures; therefore, he did not support the Danish suggestion. The purpose of article 11 was to determine which party bore the risk when sending a data message. It was never really clear how the term "reasonable" would be interpreted, and therefore, the use of that term added an element of uncertainty.

23. Mr. BURMAN (United States of America) said his delegation associated itself with the comments of Spain, Singapore and Pakistan regarding the Danish suggestion. The default rules provided for the allocation of risk and it was not appropriate to subject the mechanism to further judgement. The point raised by Spain was well taken, and should be incorporated in the draft. Agreements regarding procedures leading to a more open system of interchange should be a priority for the future work of the Commission.

24. The CHAIRMAN said there appeared to be a consensus that article 11, paragraph 3 (a) (ii), should be deleted and that the Danish suggestion should not be adopted. The point raised by Spain should also be incorporated in the draft.

25. Mr. ANDERSEN (Observer for Denmark) said it had not been his intention to place restrictions on the way in which procedures were agreed upon, but he could accept the Commission's view regarding his proposal.

26. Mr. CHOUKRI (Observer for Morocco) said his delegation did not share the misgivings expressed concerning paragraph 3 (a) (ii), which provided a mechanism based on efficiency, speed and confidence. It concerned commercial transactions between two parties known to each other, and, if an error was made, civil law provided penalties and a way to end the contract.

27. Mr. BISCHOFF (Observer for Switzerland) noted that article 11 referred to a reasonable procedure, rather than a reasonable method, as in the Model Law on International Credit Transfers.

28. Mr. BAUM (Observer for the International Chamber of Commerce) said he was concerned that the deletion of subparagraph 3 (a) (ii) would have a negative impact on the broader goal of fostering open trading, for example on the Internet, when no prior agreement existed between the parties. Some delegations had seen the deleted subparagraph as fostering such trade. The underlying problem appeared to be that of ensuring that the communication was sufficiently secure. Terms such as "reasonably secure" or "properly secure" might meet that concern.

29. Mr. TELL (France) said the Model Law under discussion would apply to such means of communication as telecopy, telex, electronic mail and the Internet. He wondered whether article 11 had any legal meaning stricto sensu in the case of a telecopy, where the originator could be determined. Perhaps the Guide should contain some discussion regarding the contractual relationship between the parties in such cases.

The meeting was suspended at 11.35 a.m. and resumed at 12.05 p.m.

30. Mr. LLOYD (Australia) said the words "as its own" at the end of subparagraph 3 (b) were ambiguous and should be replaced with the phrase "to impersonate the originator".

31. The CHAIRMAN said the Commission did not appear to support that proposal.

32. Mr. CHANDLER (United States of America) pointed out that the reference to paragraph 3 (a) (ii) in paragraph 4 (b) would have to be deleted, and asked whether paragraph 6, which was in square brackets, would be retained.

33. Mr. HOWLAND (United Kingdom), supported by Mr. SCHNEIDER (Germany), proposed that the square brackets should be deleted and that paragraph 6 should be adopted as currently drafted.

34. It was so decided.

35. Mr. BURMAN (United States of America) said paragraph 2 should be redrafted so that it covered actions taken by third-party service providers. He proposed that the phrase "communicated by a person" should be replaced with "communicated by or on behalf of a person".

36. Mr. SORIEUL (International Trade Law Branch) said the resulting repetition of the phrase "on behalf of" could be confusing. The drafting group would decide how to incorporate the United States proposal into paragraph 2.

37. Mr. ALLEN (United Kingdom) proposed that the phrase "or by an information system operated by or on behalf of the originator" should be added at the end of paragraph 2 so that the provision would cover automatic messages.

38. The CHAIRMAN said the secretariat took note of the proposal, but that the drafting group would determine the final wording of the paragraph.

39. Mr. LLOYD (Australia) said the word "transmit" in paragraph 5 should be changed to "communicate", which was the term used in the rest of article 11.

40. Article 11, as amended, was adopted.

Article 14

41. Mr. FERRARI (Italy) said there was a conflict between paragraphs 1 and 2 of article 14, since the definition of the time of dispatch was identical with that of the time of receipt.

42. Mr. SORIEUL (International Trade Law Branch) said the Italian representative's observation was correct, but he saw no conflict between those paragraphs. When two parties communicated directly, the dispatch and the receipt of a data message were virtually simultaneous. Thus, a data message was considered to have been dispatched when it could no longer be changed by the originator, i.e., when it entered an information system to which the originator did not have access.

43. Mr. ABASCAL (Mexico) said the Working Group had concluded that the only time when a data message could be objectively deemed to have been sent was when it had entered a system other than that of the originator, whether the system belonged to the addressee or to an intermediary.

44. Mr. ZHANG Yuqing (China) said that, in the first sentence of paragraph 4, the order of the two phrases following the comma should be reversed so that the

place of dispatch was mentioned before the place of receipt. That would be more logical, since a data message had to be dispatched before it could be received, and the word "dispatch" appeared before "receipt" in the title of article 14.

45. Mr. HOWLAND (United Kingdom) said the text of article 14 represented a compromise reached in the Working Group and it would be preferable not to reopen the debate on the substance of the article. However, he wished to propose two minor drafting changes. In paragraph 3, the words "deemed to be" should be inserted before the word "received" to reflect the wording of paragraph 4. In subparagraph 4 (b), the words following the comma should be replaced by "the place of its habitual residence is to be regarded as its place of business".

46. Mr. SORIEUL (International Trade Law Branch) said that, although the wording of paragraph 4 (b) was not very precise, it was taken directly from article 10 of the United Nations Convention on Contracts for the International Sale of Goods (Vienna Sales Convention) and should not be changed for less than compelling reasons.

47. Mr. MADRID (Spain) said he was concerned about the exceptions to the applicability of paragraph 4 which were provided for in paragraph 5. Under paragraph 4, the parties to a contract could agree to change the place where the contract was deemed to have been concluded for procedural and jurisdictional purposes, irrespective of any objective or pre-existing criterion. That could interfere with public procedural and jurisdictional regulations because, in the event of litigation related to the contract, the parties could decide to change jurisdictions in order to avoid certain courts.

48. Mr. FERRARI (Italy) said his delegation wished to draw attention to certain consequences of comparison between dispatch and receipt of messages. Countries where a contract was concluded on the basis of the theory of expedition or mailbox rule were currently governed by the rules of reception. For example, article 16 of the Vienna Sales Convention stipulated that an offer could not be revoked once acceptance of it had been dispatched.

49. Mr. SORIEUL (International Trade Law Branch) referring to the comparison with the mailbox rule, said it was simply a matter of considering that the mailbox in such cases would be a system belonging to a third party who owned the network. The originator was deemed to have entrusted his message to the owner of the network through which he sent his message. More rarely, in cases where the parties possessed a system that enabled them to communicate directly, the time when the message was sent out and the time it was received directly coincided. The Working Group had decided that in such instances the instantaneous nature of the transaction would rule out extending the period during which a contract could be withdrawn or modified.

50. Mr. FERRARI (Italy) said in order for a contract to be concluded under the mailbox rule, it was not necessary for the relevant message to reach its destination. In the rule currently under discussion, the message actually had to reach its destination.

51. Mr. SORIEUL (International Trade Law Branch) said when a third party was used to carry a message between an originator and a recipient, it was assumed

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that the system worked and that the mailbox was open. In the current instance, the message was deemed to have been sent out once it had left the originator's control; strictly speaking, it was immaterial whether or not the message actually reached the addressee. The same criterion, that of a message actually entering the system, also applied to messages sent directly from one party to another without intermediaries. A genuine difficulty did arise, however, in cases where an addressee deliberately chose to switch off his system, thus precipitating a conflict between the mailbox rule and the rule currently under discussion.

52. Mr. CHANDLER (United States of America) said the mailbox rule, which applied to the regular mail, was not adequate to deal with the commercial realities of electronic communication. Dispatch by the originator did not necessarily mean that the message had been transmitted into the overall system. Many systems batched messages and did not send them out until a certain number had accumulated. A more reliable criterion was receipt by the addressee's system, a criterion which the United States was beginning to adopt. The informal working group had therefore made the proper decision.

53. Mr. MASUD (Observer for Pakistan) said that, in article 14, paragraph 2 (a), a distinction must be made between the ordinary transmission of data messages through electronic means and actual knowledge of the addressee as the essence of the transaction. In many cases, legal consequences could flow from the latter and not merely from the transmission of data into an information system. He therefore proposed amending the article by adding, after "designated information system", the words "except when actual knowledge of the addressee is an essence of the transaction". The word "but" would then have to be deleted.

54. Mr. CHOUKRI (Observer for Morocco) suggested deleting paragraph 5 on administrative, criminal or data protection law, as it was totally unrelated to paragraph 4.

55. Mr. HOWLAND (United Kingdom) said he agreed with the United States representative that article 14 was a tailor-made adaptation of the rule of receipt, which was well suited to modern electronic communication. He shared the concerns of the Pakistani representative but felt they were already addressed in paragraph 2 and also by the content of article 10.

56. Mr. TELL (France) said he was pleased that, as his delegation had requested, article 14, paragraph 4, would not attempt to impose any rules concerning conflict of laws.

57. Mr. UCHIDA (Japan), referring to paragraph 1, asked when a data message would be considered to occur in a situation where the originator entered the message into his own system and it was later accessed and retrieved by the addressee's information system.

58. Mr. SORIEUL (International Trade Law Branch) said the timing would be determined in the agreement between the parties. Probably, the message would occur when the addressee searched for it in the originator's system.

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59. Mr. ABASCAL (Mexico) said it was more likely that the message would occur when the addressee actually retrieved it, for it would then be in a system other than the originator's.

60. Mr. BURMAN (United States of America) said he agreed with the United Kingdom representative that article 14 was well balanced and that the concerns of the Pakistani delegation might already be addressed in the Model Law. He also supported the Spanish and Moroccan statements concerning paragraph 5, which his delegation had never found to be necessary.

61. Mr. LEBEDEV (Russian Federation) said the experts in his country had felt that paragraph 1 meant that a message was dispatched when it left the originator's information system, which was contrary to the conclusion of the Working Group. However, the Guide to Enactment (A/CN.9/426) seemed to indicate in paragraph 107, that dispatch and receipt were virtually simultaneous except where an information system had not been specifically designated by the addressee.

62. Mr. DONG Yi (China) inquired why paragraph 4, on place of receipt, was limited to computerized transmission. He noted that, in document A/CN.9/406, paragraph 49, the Working Group expressed concern that the provision might not cover telexes and telegrams. He wondered, however, whether it was applicable to telecopies, particularly when sent through a mobile phone and, in such a case, how the place of receipt of the data message was determined.

63. Mr. ABASCAL (Mexico) drew attention to situations where the originator, using a third-party provider service, dispatched a message which could not be forwarded to its destination. In such a case, the originator had complied with the dispatch rule but his responsibility regarding retransmission of the data message had yet to be determined. The Pakistani proposal was covered by the rule of information, not the rule of receipt. Under contract law, the message occurred when the addressee became aware of its content.

64. Mr. SORIEUL (International Trade Law Branch) said he could offer only a partial response to the Chinese delegation. Paragraph 4, as worded, did not apply to telexes and telegrams. The extent to which it covered telecopies was unclear, for telecopies could be transmitted electronically but also by other means. It was for the Commission to decide whether the paragraph covered telecopies.

The meeting rose at 1.05 p.m.